

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

LENNY A. ELLSWORTH,)	
)	No. CV-09-0344-JPH
Plaintiff,)	
)	ORDER GRANTING DEFENDANT'S
v.)	MOTION FOR SUMMARY JUDGMENT
)	
MICHAEL J. ASTRUE,)	
Commissioner of Social)	
Security,)	
)	
Defendant.)	

BEFORE THE COURT are cross-motions for summary judgment, noted for hearing without oral argument on September 3, 2010. (Ct. Rec. 18, 23). Plaintiff Lenny A. Ellsworth ("Plaintiff" or "claimant") filed a reply brief on July 13, 2010. (Ct. Rec. 25). Attorney Maureen Rosette represents Plaintiff; Special Assistant United States Attorney Daphne Banay represents the Commissioner of Social Security ("Commissioner"). The parties filed a consent to proceed before a magistrate judge. (Ct. Rec. 7). After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS** Defendant's Motion for Summary Judgment (Ct. Rec. 23) and **DENIES** Plaintiff's Motion for Summary Judgment (Ct. Rec. 18).

JURISDICTION

On February 14, 2006, Plaintiff protectively filed applications for Disability Insurance Benefits ("DIB") and Supplemental Security Income ("SSI") benefits. (Administrative Record ("AR") 41). Plaintiff's applications were denied initially and on reconsideration. An administrative hearing was held before

1 Administrative Law Judge ("ALJ") Richard A. Say on October 23,
2 2007. (AR 390-414). On November 2, 2007, the ALJ issued a
3 decision finding that Plaintiff was not disabled. (AR 41-51).
4 The Appeals Council denied Plaintiff's request for review on
5 October 30, 2009. (AR 4-7). Therefore, the ALJ's decision became
6 the final decision of the Commissioner, which is appealable to the
7 district court pursuant to 42 U.S.C. § 405(g). Plaintiff filed
8 this action for judicial review pursuant to 42 U.S.C. § 405(g) on
9 November 12, 2009. (Ct. Rec. 1).

10 STATEMENT OF FACTS

11 The facts have been presented in the administrative hearing
12 transcript, the ALJ's decision, and Plaintiff's and Defendant's
13 briefs and, therefore, will only be summarized here. Plaintiff
14 was 46 years old on the date of the administrative hearing. (AR
15 394). Plaintiff is a high school graduate and has past relevant
16 work as a logger and a construction worker II. (AR 394, 405-406).
17 He alleges disability as of June 1, 2005, due to loss of his right
18 eye, degenerative disc disease and post-traumatic stress disorder
19 ("PTSD"). (AR 150). Plaintiff reported he stopped working on
20 July 2, 2005, because he "couldn't get off couch and got fired.
21 kept trying until I couldn't do anything." (AR 150). Plaintiff
22 testified that pain in his left shoulder, back and neck prevent
23 him from working. (AR 395).

24 STANDARD OF REVIEW

25 Congress has provided a limited scope of judicial review of a
26 Commissioner's decision. 42 U.S.C. § 405(g). A court must uphold
27 the Commissioner's decision, made through an ALJ, when the
28 determination is not based on legal error and is supported by

1 substantial evidence. *See Jones v. Heckler*, 760 F.2d 993, 995
2 (9th Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir.
3 1999). "The [Commissioner's] determination that a plaintiff is
4 not disabled will be upheld if the findings of fact are supported
5 by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572
6 (9th Cir. 1983) (*citing* 42 U.S.C. § 405(g)). Substantial evidence
7 is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d
8 1112, 1119 n.10 (9th Cir. 1975), but less than a preponderance.
9 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989);
10 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d
11 573, 576 (9th Cir. 1988). Substantial evidence "means such
12 evidence as a reasonable mind might accept as adequate to support
13 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)
14 (citations omitted). "[S]uch inferences and conclusions as the
15 [Commissioner] may reasonably draw from the evidence" will also be
16 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965).
17 On review, the court considers the record as a whole, not just the
18 evidence supporting the decision of the Commissioner. *Weetman v.*
19 *Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989) (*quoting Kornock v.*
20 *Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

21 It is the role of the trier of fact, not this court, to
22 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If
23 evidence supports more than one rational interpretation, the court
24 may not substitute its judgment for that of the Commissioner.
25 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579
26 (9th Cir. 1984). Nevertheless, a decision supported by
27 substantial evidence will still be set aside if the proper legal
28 standards were not applied in weighing the evidence and making the

1 decision. *Browner v. Secretary of Health and Human Services*, 839
2 F.2d 432, 433 (9th Cir. 1988). Thus, if there is substantial
3 evidence to support the administrative findings, or if there is
4 conflicting evidence that will support a finding of either
5 disability or nondisability, the finding of the Commissioner is
6 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir.
7 1987).

8 SEQUENTIAL EVALUATION PROCESS

9 The Social Security Act (the "Act") defines "disability" as
10 the "inability to engage in any substantial gainful activity by
11 reason of any medically determinable physical or mental impairment
12 which can be expected to result in death or which has lasted or
13 can be expected to last for a continuous period of not less than
14 twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The
15 Act also provides that a Plaintiff shall be determined to be under
16 a disability only if his impairments are of such severity that
17 Plaintiff is not only unable to do his previous work but cannot,
18 considering Plaintiff's age, education and work experiences,
19 engage in any other substantial gainful work which exists in the
20 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).
21 Thus, the definition of disability consists of both medical and
22 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156
23 (9th Cir. 2001).

24 The Commissioner has established a five-step sequential
25 evaluation process for determining whether a person is disabled.
26 20 C.F.R. §§ 404.1520, 416.920. Step one determines if he is
27 engaged in substantial gainful activities. If he is, benefits are
28 denied. 20 C.F.R. §§ 404.1520(b), 416.920(b). If he is not, the

1 decision maker proceeds to step two, which determines whether
2 Plaintiff has a medically severe impairment or combination of
3 impairments. 20 C.F.R. §§ 404.1520(c), 416.920(c).

4 If Plaintiff does not have a severe impairment or combination
5 of impairments, the disability claim is denied. If the impairment
6 is severe, the evaluation proceeds to the third step, which
7 compares Plaintiff's impairment with a number of listed
8 impairments acknowledged by the Commissioner to be so severe as to
9 preclude substantial gainful activity. 20 C.F.R. §§ 404.1520(d),
10 416.920(d); 20 C.F.R. § 404 Subpt. P App. 1. If the impairment
11 meets or equals one of the listed impairments, Plaintiff is
12 conclusively presumed to be disabled. If the impairment is not
13 one conclusively presumed to be disabling, the evaluation proceeds
14 to the fourth step, which determines whether the impairment
15 prevents Plaintiff from performing work he has performed in the
16 past. If Plaintiff is able to perform his previous work, he is
17 not disabled. 20 C.F.R. §§ 404.1520(e), 416.920(e). If Plaintiff
18 cannot perform this work, the fifth and final step in the process
19 determines whether Plaintiff is able to perform other work in the
20 national economy in view of his residual functional capacity and
21 his age, education and past work experience. 20 C.F.R. §§
22 404.1520(f), 416.920(f); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

23 The initial burden of proof rests upon Plaintiff to establish
24 a *prima facie* case of entitlement to disability benefits.
25 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v.*
26 *Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is
27 met once Plaintiff establishes that a physical or mental
28 impairment prevents him from engaging in his previous occupation.

1 The burden then shifts to the Commissioner to show (1) that
2 Plaintiff can perform other substantial gainful activity and (2)
3 that a "significant number of jobs exist in the national economy"
4 which Plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498
5 (9th Cir. 1984).

6 **ALJ'S FINDINGS**

7 The ALJ found at step one that Plaintiff has not engaged in
8 substantial gainful activity ("SGA") since June 1, 2005. (AR 43).
9 The ALJ determined that Plaintiff has bulging discs of the
10 cervical spine status post discectomy and fusion, right eye
11 enucleation, right conductive hearing loss, and depression, severe
12 impairments, but that he does not have an impairment or
13 combination of impairments which meet or equal a Listings
14 impairment. (AR 43, 47).

15 The ALJ concluded that Plaintiff retains the residual
16 functional capacity ("RFC") to perform a range of light exertion
17 level work. (AR 48). The ALJ indicated that Plaintiff can
18 frequently climb ramps or stairs, or engage in stooping,
19 crouching, crawling, kneeling, and balancing; he can occasionally
20 climb ladders, but should never climb ropes or scaffolds; he can
21 occasionally reach overhead with the left arm; he has limited
22 depth perception; he should avoid hazards such as unprotected
23 heights or dangerous machinery; and he takes medication for mild
24 to moderate chronic pain, but is able to remain attentive,
25 responsive, and reasonably alert to perform required job
26 functions. (AR 48). The ALJ determined at step four of the
27 sequential evaluation process that Plaintiff is not able to
28 perform any past relevant work. (AR 50).

1 It is the province of the ALJ to make credibility
2 determinations. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir.
3 1995). However, the ALJ's findings must be supported by specific
4 cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir.
5 1990). Once the claimant produces medical evidence of an
6 underlying impairment, the ALJ may not discredit his testimony as
7 to the severity of an impairment because it is unsupported by
8 medical evidence. *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir.
9 1998) (citation omitted). Absent affirmative evidence of
10 malingering, the ALJ's reasons for rejecting the claimant's
11 testimony must be "clear and convincing." *Lester v. Chater*, 81
12 F.3d 821, 834 (9th Cir. 1995). There is no affirmative evidence
13 of malingering in this case; therefore, the ALJ was required to
14 give "clear and convincing" reasons for rejecting Plaintiff's
15 testimony. *Lester*, 81 F.3d at 834.

16 The ALJ determined that Plaintiff's subjective complaints
17 regarding the extent of his functional limitations were not fully
18 credible. (AR 49). In support of this finding, the ALJ indicated
19 as follows: (1) Plaintiff testified he still had numbness in his
20 left three fingers, yet he told Dr. Meyer he had only some
21 intermittent numbness in his left index finger, and some stiffness
22 in his neck; (2) Plaintiff told Dr. Britt in April 2005 that he
23 had been getting wood in, which is indicative of more work-like
24 activity than he testified to; (3) Dr. Gray noted vagueness in
25 Plaintiff's statements leading him to wonder if there might be a
26 problem of central nervous system deterioration, yet Dr. Ashworth
27 stated that mental status exam did not indicate any major
28 deficits, indicating inconsistency of presentation. Dr. Gray also

1 stated there was not a whole lot of impairment except for
2 consistent pain; (4) Plaintiff testified he is depressed and has
3 trouble with depth perception, yet his activities, including
4 hitting golf balls, performing the drums at powwows, playing
5 horseshoes in a league, shooting pool, beadwork, hunting and
6 fishing, and visiting others, indicated a higher level of
7 functioning than he described; (5) Plaintiff stated the hearing
8 loss on his left side was worse than his right, but an audiogram
9 showed hearing loss on the right only; and (6) Plaintiff testified
10 he is supposed to wear hearing aids, but does not like them. (AR
11 49).

12 The ALJ first noted inconsistencies between Plaintiff's
13 statements regarding numbness in his left three fingers and the
14 objective medical evidence. (AR 49). Inconsistencies in a
15 disability claimant's testimony supports a decision by the ALJ
16 that a claimant lacks credibility with respect to his claim of
17 disabling pain. *Nyman v. Heckler*, 779 F.2d 528, 531 (9th Cir.
18 1986). The ALJ next noted Plaintiff's documented work-like
19 activity: "getting wood in". Work-like activity is clearly
20 inconsistent with an alleged inability to perform work. The ALJ
21 also noted evidence of Plaintiff's inconsistency of presentation.
22 An ALJ may properly rely on inconsistencies in finding a
23 claimant's subjective complaints less than completely credible.
24 *Parra v. Astrue*, 481 F.3d 742, 750 (9th Cir. 2007). The ALJ
25 further indicated that Plaintiff's activities, including hitting
26 golf balls, performing the drums at powwows, playing horseshoes in
27 a league, shooting pool, beadwork, hunting and fishing, and
28 visiting others, indicated a much higher level of functioning than

1 what he described. It is well-established that the nature of
2 daily activities may be considered when evaluating credibility.
3 *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989). The ALJ also
4 noted that Plaintiff is supposed to wear hearing aids, but
5 indicates that he does not like them. Noncompliance with medical
6 care cast doubt on a claimant's subjective complaints. *Id.*

7 The Commissioner does concede that the ALJ mistakenly relied
8 upon his belief that Plaintiff testified that his hearing loss on
9 his left side was worse than the right (AR 49), when Plaintiff
10 instead actually testified that his hearing loss was worse on his
11 right side (AR 401). However, an error in the credibility
12 analysis is harmless error when substantial evidence supports the
13 ALJ's ultimate conclusion that the claimant's testimony was not
14 credible. *Carmickle v. Comm'r, Soc. Sec. Admin.*, 533 F.3d 1155,
15 1162-1163 (9th Cir. 2008); *Batson v. Comm'r Soc. Sec. Admin.*, 359
16 F.3d 1190, 1197 (9th Cir. 2004); *Curry v. Sullivan*, 925 F.2d 1127,
17 1131 (9th Cir. 1990); *Booz v. Sec. of Health and Human Services*,
18 734 F.2d 1378, 1380 (9th Cir. 1984). In this case, the ALJ cited
19 several valid reasons supported by substantial evidence in the
20 record for finding Plaintiff not fully credible. *See supra*. As a
21 result, this erroneous reason offered by the ALJ constitutes
22 harmless error.

23 After reviewing the record, the undersigned finds that the
24 reasons provided by the ALJ for finding Plaintiff not fully
25 credible, as outlined above, are clear and convincing and
26 supported by substantial evidence. Accordingly, the ALJ did not
27 err by concluding that Plaintiff's testimony was not entirely
28 credible in this case.

1 **II. RFC Determination**

2 Plaintiff asserts that the ALJ failed to properly assess his
3 RFC. (Ct. Rec. 19 at 15-21). RFC is defined as the most one can
4 still do despite the individual's limitations. 20 C.F.R. §§
5 404.1545(a)(1), 416.945(a)(1). In making a RFC determination, the
6 ALJ considers the claimant's symptoms, including pain, and the
7 extent to which these symptoms can be reasonably accepted as
8 consistent with the objective medical evidence and other evidence
9 of record. The ALJ also considers the opinions of "acceptable
10 medical sources" which reflect the judgment about the nature and
11 severity of the impairments and resulting limitations.

12 The ALJ found that Plaintiff had the RFC to perform light
13 exertion level work with certain restrictions. (AR 48). The ALJ
14 indicated that Plaintiff can frequently climb ramps or stairs, or
15 engage in stooping, crouching, crawling, kneeling, and balancing;
16 he can occasionally climb ladders, but should never climb ropes or
17 scaffolds; he can occasionally reach overhead with the left arm;
18 he has limited depth perception; he should avoid hazards such as
19 unprotected heights or dangerous machinery; and he takes
20 medication for mild to moderate chronic pain, but is able to
21 remain attentive, responsive, and reasonably alert to perform
22 required job functions. (AR 48).

23 **A. Mental Limitations**

24 With respect to Plaintiff's mental ability, Plaintiff argues
25 that limitations assessed by Marty King, LMHP, M.Ed., and Ron
26 Casebeer, M.Ed., reflect limitations from his mental impairments
27 which cause more than slight abnormalities on his ability to work.
28 (Ct. Rec. 19 at 15).

1 It is important to note at the outset, as noted by the ALJ,
2 that Mr. King and Mr. Casebeer are not physicians or licensed or
3 certified psychologists. (AR 50). Therefore, their testimony and
4 opinions do not qualify as "medical evidence . . . from an
5 acceptable medical source" as required by the Social Security
6 regulations. 20 C.F.R. §§ 404.1513, 416.913.

7 On September 28, 2005, Mr. King filled out a check-box¹
8 psychological/psychiatric evaluation form for GAU benefits. (AR
9 287-291). Plaintiff was noted to be a poor historian and was
10 noted to have a long history of alcohol abuse with almost 30 days
11 sober. Mr. King diagnosed post-traumatic stress disorder
12 ("PTSD"), major depression, recurrent without psychotic features,
13 and alcohol dependence, early full remission. (AR 289). Mr. King
14 opined Plaintiff had marked and severe limitations in cognitive
15 factors and some marked limitations in social factors. (AR 290).

16 On January 5, 2006, Mr. King filled out another check-box
17 psychological/psychiatric evaluation form for GAU benefits. (AR
18 292-296). It was noted that Plaintiff had just gotten out of
19 chemical dependency treatment and had been abstinent for five
20 months. (AR 294). Mr. King diagnosed PTSD and opined that
21 Plaintiff had some marked limitations in cognitive factors and
22 some moderate limitations in social factors, an improvement in
23 symptoms from his report filled out just three months earlier.
24 (AR 294-295).

25
26 ¹A check-box form is entitled to little weight. *Crane v.*
27 *Shalala*, 76 F.3d 251, 253 (9th Cir. 1996) (stating that the
28 ALJ's rejection of a check-off report that did not contain an
explanation of the bases for the conclusions made was
permissible).

1 On May 25, 2006, Plaintiff was examined by Dr. Clark D.
2 Ashworth, Ph.D. (AR 215-219). Plaintiff reported to Dr. Ashworth
3 that he had not used alcohol or cocaine since July 2005.
4 Plaintiff stated that he had many friends, performed drums at
5 powwows, hit golf balls in a nearby field, played horseshoes in a
6 league, shot pool, enjoyed beadwork, hunted and fished. Dr.
7 Ashworth diagnosed polysubstance dependence in full sustained
8 remission, bereavement regarding son's death, and rule out
9 depressive disorder, NOS, and gave Plaintiff a global assessment
10 of function score of 65.² (AR 218-219). Dr. Ashworth determined
11 that there were no major mental health problems, including PTSD,
12 and opined that Plaintiff was capable of understanding,
13 remembering and carrying out work related instructions and working
14 with supervisors and coworkers. (AR 219).

15 On October 18, 2007, Ron Casebeer, M.Ed., wrote a letter to
16 Plaintiff's attorney in this matter. (AR 302). Mr. Casebeer
17 indicated Plaintiff had attended counseling services since 2005
18 for PTSD. He stated that while Plaintiff had made a lot of
19 progress, he still believed Plaintiff's PTSD disabled him. *Id.*

20 The ALJ concluded that PTSD had not been shown to be a
21 medically determinable impairment. (AR 46). This finding is
22 consistent with Dr. Ashworth's report, and Dr. Ashworth is the
23 only acceptable medical source that assessed Plaintiff's mental
24 functioning. "Information from . . . 'other sources' cannot
25 establish the existence of a medically determinable impairment.

26
27 ²A GAF of 70-61 is characterized as: "Some mild symptoms or
28 some difficulty in social, occupational, or school functioning,
but generally functioning pretty well." DIAGNOSTIC AND STATISTICAL
MANUAL OF MENTAL DISORDERS 12 (3d ed. Rev. 1987).

1 Instead, there must be evidence from an 'acceptable medical
2 source' for this purpose." See SSR 06-03p. Since Mr. King and
3 Mr. Casebeer were not acceptable medical sources, they could not
4 establish the existence of PTSD as a medically determinable
5 impairment. The ALJ determined that because the limitations found
6 by Mr. King and Mr. Casebeer were based on their diagnoses of
7 PTSD, a disorder not shown to be a medically determinable
8 impairment in this case, their opinion was given little weight.
9 (AR 50). The ALJ additionally gave their opinions "little weight"
10 because they were not physicians or psychologists. (AR 50).

11 After the ALJ's November 2, 2007 decision was filed,
12 Plaintiff submitted a check-box psychological/psychiatric
13 evaluation form completed by Mr. Casebeer on May 1, 2008. (AR 14-
14 18). On this form, Mr. Casebeer indicated a diagnosis of PTSD and
15 major depression, recurrent without psychotic features and
16 moderate limitations with cognitive and social factors. The
17 Appeals Council considered this evidence and determined that it
18 did not provide a basis for changing the ALJ's decision.³

19 This court has jurisdiction to remand matters on appeal for
20 consideration of newly discovered evidence. *Goerg v. Schweiker*,
21 643 F.2d 582, 584 (9th Cir. 1981); 42 U.S.C. § 405(g). Section
22 405(g) expressly provides for remand where new evidence is
23 "material" and there is "good cause" for the failure to
24 incorporate the evidence in a prior proceeding. *Burton v.*

25
26 ³The Appeals Council held, "[t]he Administrative Law Judge
27 decided your case through November 2, 2007. This new information
28 is about a later time. Therefore, it does not affect the
decision about whether you were disabled beginning on or before
November 2, 2007." (AR 5).

1 *Heckler*, 724 F.2d 1415, 1417 (9th Cir. 1984). To be material, the
2 new evidence must bear directly and substantially on the matter in
3 issue. *Key v. Heckler*, 754 F.2d 1545, 1551 (9th Cir. 1985).
4 Also, there must be a reasonable possibility that the new evidence
5 would have changed the outcome if it had been before the
6 Secretary. *Booz v. Secretary of Health and Human Services*, 734
7 F.2d 1378, 1380-81 (9th Cir. 1984).

8 First, the new evidence is not material. Mr. Casebeer's
9 evaluation form was completed six months after the ALJ's decision.
10 It is therefore immaterial because it does not address Plaintiff's
11 medical status during the relevant period at issue in this action.
12 Plaintiff has also not shown a reasonable possibility of changing
13 the outcome of the ALJ's determination with the new evidence. As
14 discussed above, Mr. Casebeer is not an acceptable medical source,
15 he thus cannot establish the existence of PTSD as a medically
16 determinable impairment, and his assessment is based on a
17 diagnosis of PTSD. Furthermore, Plaintiff has not shown good
18 cause for the failure to incorporate the records prior to the
19 ALJ's decision. Plaintiff offers no reason why this information
20 was not solicited earlier. *See, e.g., Allen v. Secretary of*
21 *Health and Human Services*, 726 F.2d 1470, 1473 (9th Cir. 1984)
22 (seeking out a new success with the agency does not establish
23 "good cause"). Since Plaintiff fails to meet the materiality and
24 good cause requirements, the Court is not able to consider the
25 newly submitted evidence.

26 The mental limitations assessed by the ALJ in this case are
27 in accord with the opinion of Dr. Ashworth and not inconsistent
28 with any other acceptable medical source. While Plaintiff argues

1 that the ALJ erred by failing to assess greater limitations, the
2 ALJ properly analyzed the record and determined that Plaintiff had
3 some mild symptoms but was generally functioning pretty well. The
4 record does not support a more restrictive mental RFC finding.
5 Accordingly, the Commissioner did not err in this regard.

6 **B. Physical Limitations**

7 Plaintiff also argues the ALJ's finding that Plaintiff is
8 capable of a restricted range of light duty work is not supported
9 by the record evidence. (Ct. Rec. 19 at 19-21).

10 On August 9, 2005, Edmund Gray, M.D., performed a physical
11 evaluation for GAU benefits. (AR 267-272). Dr. Gray diagnosed
12 cervical spine radiculopathy to the left arm affecting work
13 related things of lifting, handling and carrying. (AR 271). Dr.
14 Gray opined that Plaintiff could probably perform medium level
15 work. *Id.*

16 On January 3, 2006, Dr. Gray performed a repeat physical
17 evaluation for GAU benefits. (AR 232-236). On this occasion, Dr.
18 Gray diagnosed cervical disc syndrome at C7 and C6 with work
19 related activities affected that of lifting, carrying, handling,
20 pushing, pulling, reaching. (AR 236). Dr. Gray opined that
21 Plaintiff could probably perform light level work. *Id.*

22 Contrary to Plaintiff's assertions, Dr. Gray's opinions do
23 not differ from the ALJ's RFC determination that Plaintiff could
24 perform light exertion level work with certain restrictions. (AR
25 48).

26 On March 7, 2007, Plaintiff underwent an anterior cervical
27 discectomy and fusion at C5-6 and C6-7. (AR 354). In a May 17,
28 2007 follow up appointment, Kathleen L. Meyer, M.D., reported

1 Plaintiff had "excellent strength in all muscle groups of his
2 upper extremities" and had good range of motion of his neck to
3 either side. (AR 354). Dr. Meyer did not specifically assess any
4 functional limitations. Dr. Meyer's reports do not demonstrate
5 that the ALJ's physical RFC determination was erroneous.

6 After the ALJ's November 2, 2007 decision was filed,
7 Plaintiff submitted a check-box physical evaluation form completed
8 by Robert L. Fuller, M.D., on May 1, 2008. (AR 19-22). Dr.
9 Fuller diagnosed Plaintiff with chronic low back pain, blindness
10 in the right eye, shoulder rotator cuff tear, and unresolved
11 cervical spine injury. (AR 21). Dr. Fuller opined that Plaintiff
12 was "not employable." (AR 22). However, as with Mr. Casebeer
13 above, the Appeals Council considered this evidence and determined
14 that it did not provide a basis for changing the ALJ's decision.

15 Dr. Fuller's evaluation form was completed six months after
16 the ALJ's decision. It is therefore immaterial because it does
17 not address Plaintiff's physical status during the relevant period
18 at issue in this action. Plaintiff has not shown a reasonable
19 possibility of changing the outcome of the ALJ's determination
20 with the new evidence and has not shown good cause for the failure
21 to incorporate the records prior to the ALJ's decision. Since
22 Plaintiff fails to meet the materiality and good cause
23 requirements, the Court will not consider this new evidence.

24 The undersigned finds that the ALJ properly analyzed the
25 record and determined that Plaintiff could perform light exertion
26 level work with certain restrictions. While Plaintiff argues that
27 the ALJ erred by failing to assess greater limitations, the record
28 does not support a more restrictive physical RFC determination.

1 It is the responsibility of the ALJ to resolve conflicts in
2 medical testimony and resolve ambiguities. *Saelee v. Chater*, 94
3 F.3d 520, 522 (9th Cir. 1996). The court thus has a limited role
4 in determining whether the ALJ's decision is supported by
5 substantial evidence and may not substitute its own judgment for
6 that of the ALJ even if it might justifiably have reached a
7 different result upon de novo review. 42 U.S.C. § 405(g).
8 Contrary to Plaintiff's argument, the record does not support a
9 more restrictive RFC determination than as assessed by the ALJ in
10 this matter.

11 CONCLUSION

12 As determined above, the ALJ's RFC finding was appropriate in
13 this case. Accordingly, the ALJ properly concluded that Plaintiff
14 was able to perform a restricted range of light exertion level
15 work. Vocational expert K. Diane Kramer testified that based on a
16 hypothetical which included the limitations assessed by the ALJ in
17 this case, the individual would be capable of performing work as a
18 cleaner/housekeeper, a routing clerk and a mail sorter, jobs that
19 exist in significant numbers in the national economy. (AR 407-
20 408). All three jobs identified by the vocational expert are
21 light exertion level positions. *Id.* At step five of the
22 sequential evaluation process, the ALJ found that, based on
23 Plaintiff's age, education, work experience, RFC and the
24 vocational expert's testimony, Plaintiff was capable of performing
25 other work in the national economy.

26 This court must uphold the Commissioner's determination that
27 Plaintiff is not disabled if the Commissioner applied the proper
28 legal standards and there is substantial evidence in the record as

1 a whole to support the decision. Having reviewed the record and
2 the ALJ's conclusions, the court finds that the ALJ's decision is
3 supported by substantial evidence and free of legal error.
4 Plaintiff is thus not disabled within the meaning of the Social
5 Security Act. Accordingly,

6 **IT IS ORDERED:**

7 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 18**) is
8 **DENIED.**

9 2. Defendant's Motion for Summary Judgment (**Ct. Rec. 23**) is
10 **GRANTED.**

11 3. The District Court Executive is directed to enter
12 judgment in favor of Defendant, file this Order, provide a copy to
13 counsel for Plaintiff and Defendant, and **CLOSE** this file.

14 **IT IS SO ORDERED.**

15 **DATED** this 29th day of December, 2010.

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17 S/ James P. Hutton
18 JAMES P. HUTTON
19 UNITED STATES MAGISTRATE JUDGE
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